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Supreme Court, U. S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1980

No.

WILLIAM H. STEPNEY, JR., *Petitioner*

vs.

STATE OF CONNECTICUT, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

Did the Connecticut Supreme Court err in holding that a charge to a Connecticut Grand Jury which said that a person is presumed to intend the results of his acts and that in the absence of facts justifying or excusing a homicide, the grand jury should assume that intent was present and the crime was murder did not violate the petitioner's presumption of innocence?

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION.	2
QUESTION PRESENTED.	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	
THE TRIAL COURT'S CHARGE TO THE GRAND JURY REGARDING THE INTENT FACTOR IN THE CRIME OF MURDER VIOLATED THE PETITIONER'S DUE PROCESS RIGHTS GUARANTEED HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT IT ROBBED HIM OF THE PRESUMPTION OF INNOCENCE	
CONCLUSION.	25
APPENDIX (OPINION OF THE CONNECTICUT SUPREME COURT)	1A

TABLE OF CASES AND AUTHORITIES

Cases:	Page
Bell v. Wolfish, 441 U.S. 502 (1979)	20
Berkovitz v. United States, 213 F.2d 468 (5th Cir. 1954)	17
Bloch v. United States, 221 F.2d 786 (9th Cir. 1955)	17
Chappell v. United States, 270 F.2d 274 (9th Cir. 1959)	17
Cobbs v. Robinson, 528 F.2d 1331, (2d Cir., 1975)	12
Coffin v. United States, 156 U.S. 432 (1895)	14
Deutch v. United States, 367 U.S. 456 (1961)	14
Estelle v. Williams, 425 U.S. 501, (1975)	15
Hall v. State, 272, So. 2d 590, (Ala. Ct. Crim. App. 1973)	17
Hill v. Texas, 316, U.S. 400, (1942)	23
Hudson v. Parker, 156 U.S. 277, (1895)	19
In re Winship, 397 U.S. 358 (1970)	14

CASES: (continued)

	Page
Lung's Case, 1 Conn. 428 (1315)	13
McGinnis v. Royster, 410 U.S. 263, (1973)	19,20
Rose v. Mitchell, 443 U.S. 545 (1979)	22,24
Sandstrom v. Montana, 442 U.S. 510 (1979)	7,9,10,11, 16,17,21,24
Stack v. Boyle, 342 U.S. 1, (1951)	18,20
State v. Deep, Litchfield Superior Court, Docket No. 18-28954	7, 5, 21
State v. Kemp, 126 Conn. 60, 71 9 A.2d 63 (1939)	12,13
State v. Menillo, 159 Conn. 264, 275, 268 A.2d 667 (1970)	12
State v. Parks, 243 S.E. 2d 848, ___ W.Va. ___ (1978)	21
State v. Vennard, 159 Conn. 385, 270 A.2d 837 (1970)	15
State v. Warbitton, 211 Kans. 506, 506 P.2d 1152 (1973)	17
Taylor v. Kentucky, 436 U.S. 478 (1977)	15
United States v. Camp, 541, F.2d 737 (8th Cir. 1976)	21

CASES: (continued) Page

United States v. Chiantese, 506 F.2d 1244 (5th Cir. 1977) 17

United States v. Garrett, 574 F.2d 778 (3rd Cir. 1978) 17

United States v. Wharton, 139 U.S. App. D.C. 293, 433 F.2d 451 (1970) 17

Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953) 17

STATUTES:

Connecticut General Statutes

§53a-54a 4,5,7

§54-57 12

OTHER AUTHORITIES:

Connecticut Constitution (1965) Article First, Section 8 3,11

United States Constitution, Amendment 14 3

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STATE OF CONNECTICUT, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
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STATE OF CONNECTICUT

The Petitioner, William H. Stepney, Jr. respectfully prays that a Writ of Certiorari

issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on June 24, 1980.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut which appears in the Connecticut Law Journal, Volume XLI, No. 52, p. 1-6, June 24, 1980, appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Connecticut was filed on June 24, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Did the Connecticut Supreme Court err in holding that a charge to a Connecticut Grand Jury which said that a person is presumed to intend the results of his acts and that in the absence of facts justifying or excusing a homicide, the grand jury should assume that intent was present and the crime was murder did not violate the petitioner's presumption of innocence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 14:

> ...nor shall any state deprive any person of life, liberty or property without due process of law,...

Connecticut Constitution (1965), Article First, Section 8:

> ...No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due

process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury...

Connecticut General Statutes (Revision of 1968), Section 53a-54a:

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation of excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.
(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.
(c) Murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed as provided by section 53a-46a.

STATEMENT OF THE CASE

On August 16, 1979, the defendant, William Stepney, Jr. was presented before a grand jury sitting in Litchfield County, Connecticut, to answer to a charge of murder in violation of Connecticut General Statutes, Section 53a-54.

The Connecticut Superior Court for Litchfield County charged the grand jury in part as follows:

"Now, Section 53a-54a defines murder as follows:

'A person is guilty of murder when with intent to cause the death of another causes the death of such person or of a third person or causes a suicide, or causes a suicide by force, duress, or deception, except that in any prosecution under this subsection it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a

prosecution for, or preclude a conviction of manslaughter in the first degree or any other crime."

Now, the important part of this statute is as follows:

'A person is guilty of murder when with intent to cause the death of another person he causes the death of such person, or of a third person.'

A person acts intentionally with respect to a result or the conduct described by the statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. Concerning intent, I ought to say that ordinarily a person is presumed to intend the result which follows his acts, and from that, it comes about that if you find a homocide has been committed, under such circumstances that the law does not justify it or excuse it, as I have explained it to you, then you are at liberty to fall back on this presumption that a person intends the results produced.

To state it more briefly, in the absence of facts justifying or excusing a homicide, you are at liberty to and should assume for your purposes that intent was present and the crime was murder.

In your consideration of the question of intent, it is proper that you should, if you see fit to do so, infer that there was intent from the use of a deadly and dangerous weapon, or when a homicide is expecially wanton or atrocious, that there must be intent to bring it about in that way.

If you come to the conclusion that there is a reasonable ground to believe that a homicide has been committed which has in it the factor of intent, then it

means you have come to the conclusion that there is a reasonable ground to believe that a murder has been committed." (Emphasis added).

After considering the evidence presented to it, the grand jury, on August 16, 1979, returned a true bill of indictment against the defendant, William Stepney, Jr., charging him in one count with the crime of murder in violation of Connecticut General Statutes, Section 53a-54a.

On November 13, 1979, the Superior Court for Litchfield County, Connecticut, O'Neill, J., in the case of State v. Deep, Litchfield Superior Court, Docket No. 18-28954, (Appendix p. 17A) dismissed an indictment for murder on the ground that the above quoted charge to the grand jury violated the due process clause of the Fourteenth Amendment to the United States Constitution, as interpreted by the United States Supreme Court in Sandstrom v. Montana

442 U.S. 510 (1979). In a companion decision to the instant case, the Connecticut Supreme Court held that the trial court was in error in dismissing the indictment against Deep and ordered the case remanded for further proceedings. State v. Deep, Conn. Law Journal, Vol. XLI, No. 52, p. 7 (June 24, 1980).

On December 4, 1979, the parties jointly moved for reservation to the Connecticut Supreme Court and asked that certain questions relating to the grand jury charge be answered. The Superior Court for Litchfield County, Allen, J., granted the motion.

On June 24, 1980, the Connecticut Supreme Court held that the above quoted grand jury charge did not violate Petitioner's due process rights and distinguished the case from the rule of law

set forth by this Court in Sandstrom v. Montana, supra. The Petitioner is presently awaiting trial before the Superior Court for Litchfield County.

REASONS FOR GRANTING THE WRIT

THE TRIAL COURT'S CHARGE TO THE GRAND JURY REGARDING THE INTENT FACTOR IN THE CRIME OF MURDER VIOLATES THE DEFENDANT'S DUE PROCESS RIGHTS GUARANTEED HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT IT ROBS HIM OF THE PRESUMPTION OF INNOCENCE.

This Petition challenges the legitimacy of an indictment for murder wherein the trial court has instructed the grand jury that it may presume that a person intends the result which follows his actions and that "in the absence of facts justifying or excusing a homicide, you are at liberty to and should assume for your purposes that

intent was present and the crime was murder." (Tr., p.17).[1/] At the heart of this Petition is the claim that such an instruction abrogates the presumption of innocence with which every criminal defendant is cloaked and allows a grand jury to indict for the crime of murder without any evidence being offered on the all important intent element of that crime. This creates the potential for a grand jury to fill in a necessary element of the crime through the use of its collective imagination with no legal guidance as to how the law deals with evidence relating to intent.

In view of this Court's decision in Sandstrom v. Montana, 442 U.S. 510 (1979) which held that an identical charge given

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1/ References to the transcript of the proceedings before the Grand Jury on August 16, 1979 are designated "Tr., p. __."

to a petit jury was unconstitutional. This petition raises the question of whether the giving of such an unconstitutional charge to a grand jury infects the entire proceeding thereafter. The petition for certiorari should be granted in order to clarify whether the Sandstrom decision applies to grand jury proceedings.

In Connecticut, no person can be held to answer for "any crime punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury."[2/] There is a clear distinction in this state between a constitutional grand jury and a so-called "one-man grand

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2/ Connecticut Constitution (1965), Article First, Section 8.

jury."[3/] The latter is equivalent to a common law investigatory grand jury which could inquire into crimes in general. The basic purpose of the former is to interpose between the state and one accused of murder, a body of eighteen disinterested persons, twelve of whom must agree upon an indictment to determine whether the state has shown probable cause for subjecting the accused to the expense, embarrassment and risk of a trial. State v. Menillo, 159 Conn. 264, 273 275, 268 A.2d 667 (1970). See also Cobbs v. Robinson, 528 F.2d 1331, 1338 (2d Cir., 1975). As a constitutional body it is charged with protecting the constitutional

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3/ Connecticut General Statutes, §54-47. The latitude permitted an investigatory grand jury both procedurally and in scope of the crimes it may inquire into is substantially greater than that permitted a constitutional grand jury. State v. Kemp, 126 Conn. 60, 9 A.2d 63 (1939).

guarantees of the citizens brought before it and is not merely an arm of the investigatory process. Thus it should limit "the evidence it elicits to that which is admissible in the trial of cases" State v. Kemp, 126 Conn. 60, 71, 9 A.2d 63 (1939). Indeed the grand jury in the instant case was specifically instructed that it should not consider hearsay evidence. (Tr., p.12). The fact that the state's attorney is not permitted to participate in the grand jury proceedings, Lung's Case, 1 Conn. 428 (1815) is further evidence that this body is intended to stand as a buffer between the state and the citizen and as a guardian of the basic rights which form a part of our system of criminal justice.

The presumption that one is innocent of crime until proven guilty thereof beyond a

reasonable doubt[4/] is basic to our system of law. Although the presumption of innocence is not specifically mentioned in either the United States or Connecticut Constitutions, it was first given judicial credence by this Court in Coffin v. United States, 156 U.S. 432, 453 (1895):

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary and its enforcement lies at the foundation of our criminal law.

More recently in Deutch v. United States, 367 U.S. 456, 471 (1961) the Court said:

4/ It has been held that the presumption of innocence which is the foundation of the criminal justice system is supported by the "concrete standard" of reasonable doubt against which the guilt of a defendant must be measured. In re Winship, 397 U.S. 358, 363 (1970). Both of these court made rules of criminal procedure have been given constitutional stature through the Due Process Clause.

> One of the rightful boasts of Western civilization is that the prosecution has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure....Among these is the presumption of the defendant's innocence.

See also Estelle v. Williams, 425 U.S. 501, 503 (1975). In Taylor v. Kentucky, 436 U.S. 478 (1977) it was held that failure to give a charge on the presumption of innocence when requested by defendant was reversible error.

Thus it is apparent that the presumption of innocence is so rooted in our system of jurisprudence as to be deemed one of the basic procedural requisites to a fair trial. Although a challenge to a grand jury charge will be sustained only in a case showing a clear violation of the defendant's criminal rights, State v. Vennard, 159 Conn. 385, 390, 270 A.2d 837 (1970), it

is submitted that, in light of the recent action by this Court prohibiting such a charge to a petit jury, the charge given on intent in the instant case is just such a violation as warrants immediate reversal.[5/]

In Sandstrom v. Montana, supra, this Court held that an instruction given to a petit jury over objection of defense counsel that "the law presumes that a person intends the ordinary consequences of his voluntary acts" was unconstitutional because it violated the defendants presumption of innocence in that it had the subtle effect of shifting the burden of proof on the issue of intent. In doing so, the court

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5/ In granting the motion reserving this matter to the Connecticut Supreme Court the Superior Court found that it was "in the interest of simplicity, directness and economy of judicial action" for the questions raised herein to be resolved at once. (See Order dated December 4, 1979, Allen,J.)

took note of numerous decisions[6/] both state and federal, which have held a similar instruction to be constitutionally defective. Therefore there can be no doubt that the charge challenged herein is defective. The only issue is whether or not the giving of such a charge to a grand jury constitutes a denial of due process.

While it is clear that Sandstrom prohibits the giving of a charge similar to the one challenged herein to a petit jury,

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6/ See Chappell v. United States, 270 F.2d 274 (9th Cir. 1959); Bloch v. United States, 221 F.2d 786 (9th Cir. 1955); Berkovitz v. United States, 213 F.2d 468 (5th Cir. 1954); Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953); State v. Warbritton, 211 Kans. 506, 506 P.2d 1152 (1973); Hall v. State, 272 So. 2d 590, 593 (Ala. Ct. Crim. App. 1973); United States v. Wharton, 139 U.S. App. D.C. 293, 433 F.2d 451 (1970). See also United States v. Garrett, 574 F.2d 778 (3rd Cir. 1978) and United States v. Chiantese, 506 F.2d 1244 (5th Cir. 1977) wherein the Circuit Courts ordered their District Courts to discontinue the use of such a charge.

the claim is made that no such prohibition applies to grand juries. After all the grand jury's function is merely to determine probable cause -- not guilt or innocence. Since the presumption of innocence deals with the burden of proof shouldered by the State, it has no application before a grand jury.[7/]

The quick answer to such an argument is that this Court has consistently held that the presumption of innocence attaches at the earliest stage of a criminal proceeding and follows the defendant throughout unless and until he is convicted. Therefore in Stack v. Boyle, 342 U.S. 1, 4 (1951) the Court held that the presumption of innocence

7/ Indeed the Connecticut Supreme Court said that the presumption of innocence did not attach until "following the return of the true bill of indictment." Conn. L.J., Vol. XLI, No. 52 p. 6.

is the cornerstone of the right to bail:

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 156 U.S. 277 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning

Similarly, the Court held in McGinnis v. Royster, 410 U.S. 263, 273 (1973) that a New York statute that awarded good time only to prisoners who participated in rehabilitative programs was unconstitutional since pretrial detainees could not participate in same:

> Further, it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a

> presumption of innocence. In short, an inmate in county jail is neither under the supervision of the State Correction Department nor participating in the State's rehabilitative programs. Where there is no evaluation by state officials and little or no rehabilitative participation for anyone to evaluate, there is a rational justification for declining to give good time credit.

In Bell v. Wolfish, 441 U.S. 520 (1979) the Court recently held that the presumption of innocence did not prohibit the intermingling of pretrial detainees with sentenced prisoners in New York City's Metropolitan Correctional Center. However, in doing so the majority opinion made no mention of McGinnis and Stack. In his dissent, Justice Stevens noted the viability of the law of those cases insofar as the presumption of innocence is concerned. (441 U.S. at 582, f.n.11). Petitioner herein claims that throughout the grand jury proceeding he was cloaked with the presumption of

innocence and that the charge in question lifted that cloak. This defect in the grand jury proceedings rises to the level of constitutional magnitude in view of the holding in Sandstrom and therefore taints the entire proceeding.

As the trial judge noted in his memorandum of decision in State v. Deep, supra, (Appendix p.) defects in a grand jury indictment, albeit technical in nature, will result in the reversal of a criminal conviction. State v. Parks, 243 S.E. 2d 848 ___ W.Va. ____(1978)(indictment did not include every element of the crime charged); United States v. Camp, 541 F.2d 737 (8th Cir. 1976) (the word "forcibly" was omitted from the indictment). More important, however, is the recent opinion of this Court in which it was noted that defects in the selection of a grand jury which reach

constitutional magnitude will result in a reversal notwithstanding the fact that full procedural due process was met at the petit jury stage.

In Rose v. Mitchell, 443 U.S. 545 (1979) the defendants, who had been convicted of felony murder, challenged their convictions by way of federal habeas corpus on the ground that the foreman of their grand jury had been selected on the basis of a racially discriminatory process. The Court overturned the Court of Appeals ruling sustaining the defendants claim on the limited evidentiary ground that they had failed to establish a prima facie case of racial discrimination.[8/] However, in doing

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8/ The Court rejected the Court of Appeals finding that there had "never been a black foreman or forewoman of a grand jury in Tupton County" Tennessee, on the ground that it had exaggerated the importance of the recollections testified to by a trial judge, three jury commissioners, and three former grand jury foremen. (443 U.S. at 569)

so, the Court did an extensive analysis of the constitutional standard to be applied to grand juries. It specifically rejected the argument that a constitutionally correct trial before a petit jury cured whatever constitutional defect may have existed in the grand jury proceeding. (443 U.S. at 554). The Court said that if blacks have been systematically excluded from a grand jury selection process that:

> The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. "The injury is not limited to the defendant -- there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." (443 U.S. at 556)

The Court went on to quote at length from its opinion in Hill v. Texas, 316 U.S. 400, 406 (1942) which dealt with improprieties in the selection of grand jurors themselves.

> But it is our duty as well as the State's to see to it that throughout the procedure for bringing him [the defendant] to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely[9/] objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained. (443 U.S. at 557)

By way of analogy to the dicta in Rose v. Mitchell, supra, the Petitioner notes that the challenged jury instruction is clearly unconstitutional under the holding of Sandstrom v. Montana, supra. Of particular note is the mandatory language of the charge which told the grand jury that in the absence of facts explaining the homicide it was "at liberty and should assume"that

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9/ The court noted that possible increased cost associated with its ruling. It further noted the right of the state to reindict and obtain if possible, a constitutionally sound indictment. (443 U.S. at 557-58). The same opportunity was presented to the State of Connecticut in the instant case.

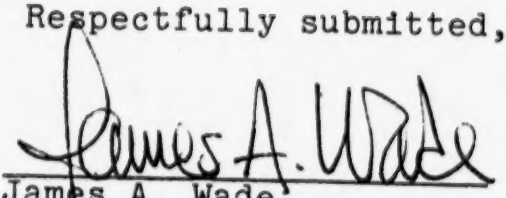
intent was present and the crime was murder. Given its unconstitutional status, the court has a duty to prohibit the use of this charge during any stage of the procedure utilized by the state in seeking to obtain the conviction of the defendant. Since the grand jury stage is a constitutionally mandated step in the procedure for answering to the crime of murder, the use of this impermissible charge taints the indictment under which the defendant stands accused. The issue has been raised in a timely fashion and should be disposed of at this time.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and

opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,



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APPENDIX TO PETITION

INDEX TO APPENDIX

		Page
1.	Decision of Connecticut Supreme Court in State of Connecticut v. William H. Stepney, Jr.	1A
2.	Memorandum of Decision Re: Motion to Dismiss in State of Connecticut v. George J. Deep	17A

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CONNECTICUT REPORTS

SUPREME COURT

March Term, 1980

STATE OF CONNECTICUT *v.* WILLIAM H. STEPNEY, JR.

STATE OF CONNECTICUT *v.* DANIEL VINAL, JR.

COTTER, C. J., LOISELLE, BOGDANSKI, PETERS and HEALEY, Js.

Argued March 7—decision released June 24, 1980

Indictments charging the defendant in each case with the crime of murder, brought to the Superior Court in the judicial district of Litchfield and reserved by the court, *Allen, J.*, in the first case and *Covello, J.*, in the second case, for the advice of this court.

Anne C. Dranginis, assistant state's attorney, with whom were *Richard L. Shiffrin,* assistant state's attorney, and, on the brief, *Dennis A. Santore,* state's attorney, for the state in each case.

James A. Wade, with whom were *Timothy F. Bannon* and *Louis Erteschik,* for the defendant in the first case.

Joseph J. Gallicchio, for the defendant in the second case.

COTTER, C. J. The defendants Daniel Vinal, Jr., and William H. Stepney, Jr., were presented before two different grand juries for Litchfield County separately impanelled in February and August, 1979 respectively on separate indictments charging each of them with murder in violation of § 53a-54a (a) of the General Statutes. Prior to the examination of witnesses, the courts instructed each of the grand juries that intent to cause the death of the victim was an element of the crime charged in the indictment and that "ordinarily a person is presumed to intend the result which follows his acts."[1] After reviewing the evidence and interviewing witnesses, each grand jury returned a true bill.

Although neither of the defendants filed a motion to dismiss the indictments, in response to a joint motion by the defendant and the state in each case, both cases were reserved[2] to this court, and later consolidated, to determine whether the instructions given to each grand jury on the issue of intent were constitutionally defective in light of the recent United States Supreme Court decision in *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39. The sole issue presented in this appeal is whether the prohibitions enunciated in *Sandstrom* v. *Montana*, supra, regarding instructions delivered to a petit jury on the issue of criminal intent are applicable in a grand jury proceeding. For the reasons more fully stated herein, we conclude that the interests intended to be protected by the prohibitions delineated in *Sandstrom* with regard to a petit jury are not equally imperiled within the context of a grand jury proceeding as conducted in this state and therefore answer the question reserved for our advice in the affirmative.

I

In this state, a grand jury indictment is required to commence a criminal prosecution only in cases where the offense charged is punishable by death or life imprisonment. Conn. Const., art. I § 8. General Statutes § 54-45 provides in pertinent part: "The superior court may, when necessary, order a grand jury of eighteen electors of the judicial district where said court is sitting to be summoned, impaneled and sworn to inquire after and present such offenses as are cognizable by said court. . . . No person shall be put to plea or held to trial for any crime the punishment of which may be death or imprisonment for life unless an indictment has been found against him for such crime by a grand jury legally impaneled and sworn, and no bill shall be presented by any grand jury unless at least twelve of the jurors agree to it." See *Alexander* v. *Louisiana,* 405 U.S. 625, 633, 92 S. Ct. 1221, 31 L. Ed. 2d 536; *Hurtado* v. *California,* 110 U.S. 516, 534, 4 S. Ct. 111, 28 L. Ed. 232; *State* v. *Cobbs,* 164 Conn. 402, 407, 324 A.2d 234, cert. denied, 414 U.S. 861, 94 S. Ct. 77, 38 L. Ed. 2d 112; *Kennedy* v. *Walker,* 135 Conn. 262, 272, 63 A.2d 589, aff'd, 337 U.S. 901, 69 S. Ct. 1046, 93 L. Ed. 1715, reh. denied, 337 U.S. 934, 69 S. Ct. 1493, 93 L. Ed. 1740. The purpose underlying the constitutional requirement of an indictment is "to prevent the harassment and suffering of an innocent person by compelling him to appear in court to respond to malicious or unfounded charges." *Kennedy* v. *Walker,* supra, 270. The purpose is achieved by interposing, between the state and the accused, a body of eighteen disinterested persons, although the agreement of only twelve of them is needed to return a true bill. General Statutes § 54-45; *Cobbs* v. *Robinson,* 528 F.2d 1331, 1338 (2d Cir.), cert. denied, 424 U.S. 947, 96 S. Ct. 1419, 47 L. Ed. 2d 354; *State* v. *Menillo,* 159 Conn. 264, 275, 268 A.2d 667. Unlike a petit

jury, a grand jury does not determine the truth of the charges contained in the indictment. The role of the grand jury, rather, is only to determine whether there is probable cause to believe the charges against the defendant require him to stand trial; it is not a trial body and does not determine the guilt or innocence of persons accused of crime. *Branzburg* v. *Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626; *State* v. *Menillo*, supra. Accord, *Wood* v. *Georgia*, 370 U.S. 375, 390, 82 S. Ct. 1364, 8 L. Ed. 2d 569. A failure to return a true bill does not foreclose prosecution of the defendant since, for the same conduct, he may be prosecuted for a lesser offense without the necessity of an indictment. *State* v. *Menillo*, supra.

Under Connecticut practice, which was followed in the present cases, the state's attorney lays a bill of indictment for murder before the Superior Court which then orders a grand jury to be summoned to consider that indictment. General Statutes § 54-45; Practice Book, 1978, § 605. The state's attorney submits a list of witnesses to the grand jury which may summon, for interrogation, the witnesses on that list together with any other witnesses whose testimony the grand jury may desire; Practice Book, 1978, § 614; and all witnesses before the grand jury are sworn to speak the truth. Practice Book, 1978, § 610. Any of the grand jurors may question a witness called to testify and that inquiry is not confined to the technical rules of evidence since the grand jury only seeks for probable cause and rules of evidence should not apply. *State* v. *Stallings*, 154 Conn. 272, 280, 224 A.2d 718. Practice Book, 1978, § 611. See *Costello* v. *United States*, 350 U.S. 359, 363, 76 S. Ct. 406, 100 L. Ed. 397. During the examination of witnesses by the grand jury, neither the court, the state's attorney nor an attorney representing the accused may be present in the grand jury room. Practice Book, 1978, § 609; *State*

v. *Piskorski,* Conn. (40 Conn. L.J., No. 51, p. 1B); *State* v. *Menillo,* supra. Within the discretion of the judicial authority, however, the accused is permitted, albeit not required, to be present, and in these cases the defendants were present in the grand jury room during the examination of witnesses although no one is permitted in the grand jury room during the grand jury's deliberations. Practice Book, 1978, § 609. See, e.g., *State* v. *Menillo,* supra. The accused is under no obligation to speak, and, since the "grand jury does not determine guilt or innocence but merely determines whether there is probable cause to justify putting the accused on trial for murder, the accused, although allowed to ask proper questions of the witnesses before the grand jury, is not allowed to testify or to introduce evidence tending to prove his innocence." *State* v. *Menillo,* supra, 274; *Cobbs* v. *Robinson,* supra. Not being able to present any defense to the charges in the indictment, the defendant is "in effect, a spectator to the proceedings from which the grand jury had only to determine whether he should even be required to stand trial." *State* v. *Stallings,* supra, 283.

II

In *Sandstrom,* the United States Supreme Court held that the instruction delivered to the petit jury, which of course involved a trial and not an indictment proceeding, that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated the defendant's constitutional right to due process under the fourteenth amendment. Given the common definition of the term "presume" and the lack of qualifying instructions as to the legal effect of the presumption, the court found an infringement of the defendant's constitutional rights because the jury could reasonably have interpreted the presumption in either of two

ways both of wh h are constitutionally impermissible because their effect is to relieve the state of its burden of proof on the element of intent.[3] *Sandstrom* v. *Montana*, supra, 517. See also *State* v. *Arroyo*, Conn. (41 Conn. L.J., No. 39, p. 6); *State* v. *Harrison*, Conn. (41 Conn. L.J., No. 9, p. 3). First, the presumption could have been interpreted by the jury as conclusive, i.e., an irrebutable direction by the court to find intent once the underlying facts are established. Such a presumption would be constitutionally infirm because it would " 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." *Sandstrom* v. *Montana*, supra, 523. See also *United States* v. *United States Gypsum*, 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854; *Morissette* v. *United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288; *State* v. *Arroyo*, supra; *State* v. *Harrison*, supra.

Even if it were not seen as conclusive, the presumption may have been interpreted by the jury as shifting the burden to the defendant, once evidence is admitted establishing his conduct, to prove that he lacked the requisite mental state. It had been firmly established, however, that a presumption with such an effect deprives a defendant of his right to due process of law which places the burden on the state to prove the existence of every element of the crime beyond a reasonable doubt. *Patterson* v. *New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281; *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508. Even if we assume, arguendo, that the instructions given in the present case would have been prohibited by the rule enunciated in *Sandstrom* had they been delivered to a petit jury,[4] the issue remains whether the defendants' constitutional rights have been violated when those instructions were given to the grand jury that returned a true bill of indictment against them.

III

"Although the due process clause guarantees the defendant a fair trial, 'it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury.' *Alexander* v. *Louisiana,* 405 U.S. 625, 633, 92 S. Ct. 1221, 31 L. Ed. 2d 536. 'Once the State chooses to provide grand . . . juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria.' *Carter* v. *Jury Commission,* 396 U.S. 320, 330, 90 S. Ct. 518, 24 L. Ed. 2d 549." *State* v. *Cobbs,* supra, 407; *Cobbs* v. *Robinson,* supra, 1334. Due to the limited function of the grand jury and the nature of the consequences of an indictment, however, there has been a reluctance to make applicable in a grand jury proceeding all of those constitutional principles that have been recognized to be applicable in a criminal trial before the court or a petit jury.

In a series of decisions by the United States Supreme Court, it has been unequivocally established that the validity of an indictment is not affected by the character of the evidence considered by the grand jury and "that an indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment."[8] *Lawn* v. *United States,* 355 U.S. 339, 349, 78 S. Ct. 311, 2 L. Ed. 2d 321. In *Holt* v. *United States,* 218 U.S. 2245, 31 S. Ct. 2, 54 L. Ed. 1021, the court held that an indictment should not be quashed because it was supported in part by incompetent evidence. Later, in *Costello* v. *United States,* 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397, the court went further and held that an indictment, returned by a legally constituted and unbiased grand jury,[9] was valid even though all of the evidence before the grand jury was in the nature

of hearsay. See also *State* v. *Stallings*, supra. The rationale of the holding in *Costello* was stated thusly: "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment." Id., 363.

In *United States* v. *Blue*, 384 U.S. 251, 86 S. Ct. 1416, 16 L. Ed. 2d 510, the court held that even assuming that the indictment was based on evidence acquired in violation of the fifth amendment, dismissal of the indictment was not required.[7] "Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether." Id., 255. The court stated that the defendant "would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial." (Footnote omitted.) Id. Nor can the fourth amendment be invoked as a basis for dismissing an indictment since it is not applicable to grand jury proceedings. In *United States* v. *Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561, the court held that the exclusionary rule of the fourth amendment does not limit the grand jury's power to compel a witness to answer questions predicated on evidence obtained as a result of an unlawful search or seizure.[8] Weighing the potential injury to the role of the grand jury against the potential benefits of applying the exclusionary rule to a grand jury proceeding,[9] the court concluded that "allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties." Id., 350.

Similarly, on the rationale that a grand jury proceeding is not a "critical stage" of the prosecution, it has been established that an accused has no constitutional right to have an attorney present in the grand jury room during the examination of witnesses; *United States* v. *Mandujano,* 425 U.S. 564, 581, 96 S. Ct. 1768, 48 L. Ed. 2d 212; *State* v. *Piskorski,* supra; *State* v. *Villafane,* 171 Conn. 644, 660, 372 A.2d 82, cert. denied, 429 U.S. 1106, 97 S. Ct. 1137, 51 L. Ed. 2d 558; *State* v. *Stallings,* supra; nor is there any constitutional requirement that a defendant be afforded a transcript of the grand jury proceeding.[10] *State* v. *Piskorski,* supra; *State* v. *Moynahan,* 164 Conn. 560, 592, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219; *State* v. *Delgado,* 161 Conn. 536, 539, 290 A.2d 338. Cf. *Chesney* v. *Robinson,* 403 F. Sup. 306 (D. Conn.), aff'd, 538 F.2d 308, cert. denied, 429 U.S. 867, 97 S. Ct. 177, 50 L. Ed. 2d 147. It is evident thus that because of the unique nature and function of the grand jury as solely an accusatory body, the plethora of constitutional protections generally deemed necessary at trial are not required in the context of a grand jury proceeding. With this background, we consider the question presented in this appeal.

IV

As discussed previously, the instruction to a petit jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts" was deemed, in *Sandstrom,* constitutionally impermissible insofar as the jury could have interpreted the presumption either as shifting the burden to the defendant to prove an absence of intent or as conclusively establishing the element of intent. In each of the grand jury proceedings in these cases, the grand jurors were instructed that the accused was not permitted to testify before them or to present evidence in his defense. Aware of the limitations on the accuseds' participation in the proceed-

ing, and that the proceeding was not a trial, the grand jurors could not reasonably have interpreted the presumption as shifting a burden of proof to the accused knowing, as they did, that they were not permitted to do anything to meet any such burden.[11]

Alternatively, even assuming arguendo that the grand jurors could have given the presumption conclusive effect, this would not necessarily invalidate the indictment for, as the court recognized in *Sandstrom,* where these kinds of presumptions are constitutional, the instruction can be adjudged valid.[12] In *Sandstrom,* a conclusive presumption, in the context of a criminal trial, was determined to be unconstitutional for two reasons: (1) a conclusive presumption conflicts with the overriding presumption of the defendant's innocence; and (2) a conclusive presumption invades the factfinding function of the petit jury.

Considering first the effect of the challenged instructions on the presumption of innocence, it has been established that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States,* 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481. Shortly before *Sandstrom* was decided, the court described the presumption of innocence as "a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial." *Bell* v. *Wolfish,* 441 U.S. 520, 533, 99 S. Ct. 1861, 60 L. Ed. 2d 447. In *Bell,* however, the court concluded that the presumption of innocence applies

only at trial and could not form the basis of a challenge, on due process grounds, to the conditions of confinement for pretrial detainees.[13] Similarly, since the conflict with the presumption of innocence sought to be avoided in *Sandstrom* does not exist in a grand jury proceeding, the presumption of innocence cannot form the basis of the defendant's challenge to the instructions to the grand jury on the legal presumption of criminal intent.

A conviction by a petit jury is, in effect, a determination that the state has presented sufficient evidence to rebut the presumption of the defendant's innocence as to each element of the crime charged. The conflict in *Sandstrom* arises from the fact that a conclusive presumption that the defendant possessed the requisite intent similarly rebuts the presumption of the defendant's innocence as to the element of intent. Both the presumption of innocence and the conclusive presumption of intent, therefore, cannot coexist since the existence of the latter negates the former. Such a conflict does not exist, however, in a grand jury setting inasmuch as an indictment is not a determination of guilt or innocence and therefore does not rebut or accept the presumption of the defendant's innocence. Following the return of a true bill of indictment, the defendant is presumed innocent until proven otherwise at trial where he is afforded the full panoply of constitutional, statutory and legal rights.

Nor can we say that a conclusive presumption impermissibly invades the factfinding function of the grand jury. Unlike a petit jury, whose function is to determine the truth of the facts presented at trial, the grand jury determines only whether there is probable cause[14] to believe the facts contained in the indictment. "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they

are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar* v. *United States,* 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879. See *Zurcher* v. *Stanford Daily,* 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525. The consequences of such a presumption in a grand jury proceeding are markedly different from those in a criminal trial and hence the protections enunciated in *Sandstrom* are not required in a proceeding of this nature.

The first question is answered in the affirmative. A second question also reserved requires no answer.

In this opinion the other judges concurred.

FOOTNOTES

1 The instructions in each of the cases, which were identical in all material aspects, pertinent to the issue of intent delivered by the court were as follows:

"A person is guilty of murder when with intent to cause the death of another person he causes the death of such person, or of a third person.

"A person acts intentionally with respect to a result or the conduct described by the statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. Concerning intent, I ought to say that ordinarily a person is presumed to intend the result which follows his acts, and from that, it comes about that if you find a homicide has been committed, under such circumstances that the law does not justify it or excuse it, as I have explained it to you, then you are at liberty to fall back on this presumption that a person intends the results produced.

"To state it more briefly in the absence of facts justifying or excusing a homicide, you are at liberty to and should assume for your purposes that intent was present and the crime was murder.

"In your consideration of the question of intent it is proper that you should, if you see fit to do so, infer that there was intent from the use of a deadly and dangerous weapon, or when a homicide is especially wanton or atrocious, that there must be intent to bring it about in that way.

"If you come to the conclusion that there is a reasonable ground to believe that a homicide has been committed which has in it the factor of intent, then it means you have come to the conclusion that there is a reasonable ground to believe that a murder has been committed."

2 We need answer only the first question reserved for our advice:

"1. Does the jury charge given to the Grand Jury by the Superior Court for Litchfield County in the above entitled action regarding the intent factor in the crime of murder contained in the stipulation of facts annexed hereto meet the due process requirements of the Fourteenth Amendment to the United States Constitution?"

3 In *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39, the state of Montana offered two interpretations of the presumption on intent which it contended upheld the constitutionality of the presumption. First, the state argued that the presumption merely described a permissive inference which did not require, but merely allowed the jury to draw conclusions about the defendant's intent. The court rejected this characterization of the presumption. The absence of instructions indicating that the jury had a choice or that they might infer that the conduct of the defendant was accompanied by the requisite intent raised the possibility that a reasonable juror could have viewed the presumption as mandatory.

Secondly, the state argued that the presumption, even if viewed as a mandatory one, was not conclusive under state law but could be rebutted by the defendant with "some" evidence thereby shifting to the defendant only a burden of production rather than the burden of persuasion on the element of intent. The court also rejected this characterization of the presumption without determining its constitutionality. Recognizing the authority of the state Supreme Court in determining, under state law, the legal weight to be accorded a presumption, the court nonetheless stated that "a reasonable juror could well have been misled by the instruction given, and could have believed that the presumption was not limited to requiring the defendant to satisfy only a burden of production." Id., 517.

4 In *State v. Arroyo*, Conn. (41 Conn.L.J., No. 39, p. 6), this court recognized that "*Sandstrom* does not invalidate the use of all inferences and presumptions with regard to criminal intent." Viewing the charge as a whole, there would be no constitutional infirmity if it were made clear to the jury, inter alia, that they were permitted but not required to infer criminal intent from the defendant's conduct. *State v. Arroyo*, supra, 7, and cases cited therein.

5 In discussing the sufficiency of accusation required for a facially valid indictment, the United States Supreme Court, in *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590, stated: "Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Id., 117.

6 It has been firmly established that a defendant may challenge the validity of an indictment on the ground that the system for the selection of the grand jury was discriminatory. *Rose v. Mitchell*, 443 U.S. 99 S. Ct. 2993, L. Ed. 2d ; *Alexander v. Louisiana*, 405 U.S. 625, 92 S. Ct. 1221, 31 L. Ed. 2d 536; *State v. Carr*, 172 Conn. 608, 376 A.2d 74; *State v. Cobbs*, 164 Conn. 402, 324 A.2d 234.

7 See also *Lawn v. United States*, 355 U.S. 339, 349, 78 S. Ct. 311, 2 L. Ed. 2d 321, where the court held that the defendants did not possess any constitutional right to have a "full dress hearing" to determine whether the grand jury which indicted them had relied on evidence acquired in violation of their fifth amendment rights. Cf. *United States v. Mandujano*, 425 U.S. 564, 96 S. Ct. 1768, 48 L. Ed. 2d 212 (although *Miranda* warnings are not required for a witness before a grand jury, he may refuse to answer a question on the ground that the answer would be self-incriminating in violation of the fifth amendment to the federal constitution).

8 See also *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54; *Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541. Reaffirming the rule that an illegal arrest or detention does not void a subsequent conviction, the court, in *Gerstein*, held (p. 114) that the fourth amendment "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest" which is not, however, required where an indictment is returned against the defendant. As the court explained, "[t]he willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution." Id., 117 n. 19.

9 In *United States v. Calandra*, 414 U.S. 338, 349, 94 S. Ct. 613, 38 L. Ed. 2d 561, the court stated further: "Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial. Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." Cf. *Gelbard v. United States*, 408 U.S. 41, 60, 92 S. Ct. 2357, 33 L. Ed. 2d 179.

10 The legislature recently enacted Public Acts 1978, No. 78-289, §1, codified in General Statutes §54-45a, which requires that a transcript of grand jury proceedings, excluding deliberations, be made and access thereto made available to the accused.

11 It is not entirely accurate to state that either party has the burden of proof in a grand jury proceeding. The defendant is not permitted to present evidence to the grand jury. The state also does not, in a strict sense, present evidence to the grand jury but, as indicated previously, merely submits a list of witnesses whom the grand jury may wish to question. The grand jury, unlike a petit jury, is not, however, limited to the witnesses suggested by the state but possesses independent investigative authority and may question anyone it desires. Also, whereas a petit jury would be limited to the evidence introduced and testimony elicited from a witness by the attorneys or the court, in a grand jury proceeding, the jurors themselves may ask questions of the witnesses. Rather than considering whether any party has met its burden, the grand jury must make its own independent determination whether a true bill should be returned.

12 After conceding the possibility that a juror may have interpreted the instruction in a permissible fashion, the court nonetheless concluded that "the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid." (Footnote omitted.)" *Sandstrom v. Montana*, 442 U.S. 510, 519, 99 S. Ct. 2450, 61 L. Ed. 2d 39.

13 In *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447, pretrial detainess in a New York correctional center challenged the legality of the conditions of their confinement. The Court of Appeals for the Second Circuit relied on the presumption of innocence as the basis for finding the detainees' due process right to be free from conditions of confinement not justified by compelling necessity. Rejecting that reasoning, the court stated that "[w]ithout question, the presumption of innocence plays an important role in our criminal justice system.... But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." Id., 533. Cf. *Stack v. Boyle*, 342 U.S. 1, 4, 72 S. Ct. 1, 96 L. Ed. 3.

14 "Probable cause exists where 'the facts and circumstances within [the grand jury's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162 [45 S. Ct. 280, 69 L. Ed. 543]." (Footnotes omitted). *Draper v. United States*,, 358 U.S. 307, 313, 79 S. Ct. 329, 3 L. Ed. 2d 327.

#18-28954

STATE OF CONNECTICUT : SUPERIOR COURT

VS. : JUDICIAL DISTRICT OF LITCHFIELD

GEORGE J. DEEP : NOVEMBER 13, 1979

MEMORANDUM OF DECISION RE:
MOTION TO DISMISS

The defendant was indicted for murder under Connecticut General Statutes §53a-54a on November 21, 1978 by a grand jury of 18 persons. On August 21, 1979 he pleaded not guilty to that indictment.

The case is now ready for trial and defendant moves to dismiss the indictment by an Amended Motion to Dismiss Indictment dated November 5, 1979 because of claimed improper instructions to that grand jury.

In the judge's charge after reading the statute he explained the various elements of the crime. Concerning intent he said "that ordinarily a person is presumed to intend the results which follow his or her acts. And from that, it comes about that if you find a homicide has been committed, under such circumstances that the law does not justify or excuse it as I have explained to you, then you are at liberty to fall back on this presumption that a person intends the results produced. To state it more briefly, in the absence of facts, justifying or excusing a homicide, you are at liberty to and should assume for your purposes that intent was present and the crime was murder.

"In your consideration of the question of intent, it is proper that you should, if you see fit to do so, infer that there was intent from the use of a deadly and dangerous

weapon, or when a homicide is especially wanton or attrocious that there must have been an intent to bring it about in that way. If you come to the conclusion that there is a reasonable ground to believe that a homicide has been committed, which has in it the factor of intent, then it means you have come to the conclusion that there is reasonable ground to believe that a murder has been committed."

Such a charge to a petit jury has been found to be unconstitutional and a deprivation of a defendant's Fourteenth Amendment right to have every element of the crime that he is charged with proven beyond a reasonable doubt. Sandstrom v. Montana, ___U.S.___, (47 U.S.L.W. 4719); State v. Harrison, 41 C.L.J. No. 9, p. 3.

I. Retroactivity.

The United States Supreme Court has already ruled that its new announced doctrine in regard to charge on intent delivered to petit juries is to be retroactively applied because the purpose of the doctrine is to overcome an aspect of the trial that substantially impairs the truth-finding function and thus raises serious questions about the accuracy of prior guilty verdicts. Hankerson v. North Carolina, 432 U.S. 233 (1977).

This court must decide if that decision which on its face is limited to the trial itself is also applicable to the grand jury indictment.

What the court was really concerned with in Sandstrom, supra was that the charge was either a conclusive presumption or a presumption that shifted the burden of proof to the defendant. Both are forbidden as a denial of due process.

In Connecticut for whatever historical or legislative reasons a grand jury indictment is required in a capital or life imprisonment case. Connecticut General Statutes §54-45; Connecticut Constitution, Art. I §9.

The charge complained of does allow a finding of the element of intent without facts and merely on the basis of the presumption and thus substantially interferes with the fact-finding process. Because of that the Sandstrom doctrine must be applied retroactively. Hankerson v. North Carolina, supra; United States v. Camp, 541 F2d 737, 741 (1976).

II. Grand Jury.

In Connecticut it is our "immorial practice" to charge the grand jurors upon their duties. State v. Kemp, 126 Conn. 60, 67, 68.

"When a grand jury is considering an indictment laid before it, charging an individual or individuals with a specific crime it should no doubt restrict the evidence it elicits to that which is admissible in the trial of cases;" supra 71.

Only in a case showing a clear violation of the defendant's constitutional rights will a challenge to a grand jury charge be sustained. State v. Vennard, 159 Conn. 385, 390.

Hammond v. Brown, 323 F.Supp. 326, 342 (1971 Ohio) states that the grand jury need only find that each essential element of the crime is probably true. In the instant case the grand jury had to find as a fact that it was probable that Deep intended to kill the victim. The court's charge says that they may find that probability simply from the fact that "a person is presumed to intend the

results which follow his. . .acts" i.e. that in the absence of evidence they may "fall back on this presumption that a person intends the results produced."

Intent is an essential element of the crime of murder in Connecticut. Connecticut General Statutes §53a-54a. In order to be presented for trial for a capital offense a person must be indicted by a grand jury. Connecticut General Statutes §54-45.

Even though a person has been found guilty after a constitutionally correct petit jury trial if his indictment was not sufficient to supply any necessary element of the crime charged, the indictment is void and the conviction must be reversed. State v. Parks, 243 S.E. 2d 848 (1978) W. Va.

Every essential element of the crime charged must be found in order for an indictment to be valid. United States v. Camp, supra, p. 740, (the word "forcibly" was omitted from the indictment.)

"The word 'forcibly' does not appear in the indictment, nor does any word with a similar import. The indictment is thus defective, unless it is saved, as the United States urges, by (1) the fact that a bill of particulars in the form of a letter from the prosecutor informed the defendant of the events surrounding the incident which led to the charges against him, (2) the fact that the trial judge correctly instructed the petit jury that force is an essential element of the offense, and (3) the reference in the indictment to the statute.

"If the only office of an indictment were the giving to a defendant of notice of the charge sufficient to enable him to prepare his defense and to be protected from double

jeopardy, these factors might be persuasive. Beyond notice and double jeopardy, however, is the distinct constitutional right, protected by the Fifth Amendment, that a defendant be tried upon charges found by a grand jury. The grand jury did not see or participate in preparing the bill of particulars or the trial court's instructions to the petit jury, so neither the bill of particulars nor the instructions supply assurance that the grand jury charged the defendant with having acted forcibly. . . ." (Citations omitted)

The failure to properly instruct a grand jury is a "substantive procedural denial of due process rendering the grand jury proceedings defective." People v. Mackey, 371 NYS 2d 559 (Suffolk County Ct. 1975).

In the instant case under the charge given it is easily possible that the grand jury did not bother to find the required intent from the facts but relied on the impermissible presumption. That is a denial of due process. Sandstrom v. Montana, supra.

III. Failure to Object to the Charge.

This defendant and his lawyer both heard the charge and made no objection to it. It might be said that it is now too late to object and that defendant has waived his right. State v. Kemp, supra, 71 and 72.

In State v. Wolcott, 21 Conn. 272, 280, it was said that a plea of not guilty waives all the grand jury deficiencies.

In the instant case the defendant would be excused for his failure to object because a new constitutional right has arisen between the time of the charge to the grand jury and the motion to dismiss. State v. Evans, 165 Conn. 61, 70.

IV. Harmless Error.

Defendant has raised this issue of the validity of the charge before trial. It would not be "harmless error" to allow this case to proceed to trial knowing that there was a defect in the indictment. Pierce v. Louisiana, 306 U.S. 354, 356-358. Rose v. Mitchell, July 2, 1979 ____U.S.____, 25 Cr L. 3271. While it might be that after a full petit jury trial without objection in this matter the court would not reverse on the "harmless error" principle here we have a timely objection before trial. This the Court cannot ignore.

"The basic purpose of our constitutional requirement of indictment by a grand jury is to interpose, between the state and one accused of a crime for which punishment may be death or life imprisonment, a body of eighteen disinterested persons, twelve of whom. . .must agree upon an indictment, to determine whether the state has shown probable cause for subjecting the accused to the expense, embarassment and risk of such a trial." State v. Menillo, 159 Conn. 264, 275.

Where jeopardy has not yet attached it is proper for the prosecutor to return to the grand jury for a new indictment or call a new grand jury. United States v. Guillette, 547 F.2d 743, 753 (1976).

It is true that normally indictments need not be quashed because of erroneous instructions to a grand jury. State v. Reinosa, 29 Conn. Supp. 117, 119. However, where those instructions deprive the accused of a federally protected right, the indictment cannot stand.

The motion to dismiss is granted without prejudice.

s/ O'NEILL ,J.
NORRIS L. O'NEILL